SUPREME COURT, U.S.
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No. OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Policemen's Relief and Pension Fund
of the City of Pittsburgh,
Petitioner

v.

Audrey Ross,
Respondent

On Petition for Writ of Certiorari to the
Commonwealth Court of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner is a statutorily created defined benefit retirement plan for Pittsburgh police officers. Respondent, Audrey Ross, purports to be the widow of a retired officer, Gregory Adams, who died in 2001. Her claim of a common law marriage to Adams was upheld in a prior declaratory judgment action. While the acknowledged purpose of that action was to establish Ross' right to a surviving spouse pension, the only persons to whom she gave notice were Adams' adult children, who had no financial stake in the question of their father's marital status. They nonetheless appeared in the action and unsuccessfully contested the declaration of marriage. The Fund knew nothing of the action until it was presented with the decree, which it refused to honor. The Fund disputes the marriage.

Ross then brought the instant declaratory judgment action, asking the court to hold that the Fund was bound by the decree entered in the earlier action. The court granted her judgment on the pleadings, and ordered the Fund to pay her a pension. The order was upheld on appeal.

The following questions are presented:

1. May a pension fund be bound by a decree of surviving spouse status entered in proceedings to which it was neither party nor privy, and of which it had no knowledge?

2. If Pennsylvania's marital status determination statute permits such a fund to be so bound, does the statute violate the Due Process Clause of the Fourteenth Amendment?

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The opinion of the Commonwealth Court of Pennsylvania is reported at 871 A. 2nd 277 (Pa. Cmwlth. 2005). The first trial court opinion is reported at 151 P.L.J. 123, 23 Pa. Fiduciary Reporter 2nd 404 (2003). The second trial court opinion is unreported.

JURISDICTION

The challenged decision was rendered February 25, 2005; reargument was denied May 25, 2005. Allowance of appeal was denied by the Supreme Court of Pennsylvania on March 8, 2006. Your Honorable Court has jurisdiction of this matter pursuant to 28 U.S.C. 1257(a). The Attorney General of Pennsylvania is entitled to notice under 28 U.S.C. 2403(b), and is being served with copies of this petition.

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved is the Fourteenth Amendment, which provides in Section 1:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law[.]

STATEMENT OF THE CASE

Background

This petition seeks the issuance of a writ of certiorari to the Commonwealth Court of Pennsylvania. That court,

affirming a decision by the Civil Division of the Court of Common Pleas of Allegheny County, held petitioner, a pension fund, to be bound by a decree of surviving spouse status entered in proceedings in which it was not joined.

The Fund is a creature of statute. 53 P.S. § 23644 et seq., 26a. It is a defined benefit plan. Members contribute six percent of their salaries as dues. 53 P.S. § 23653, 27-28a. The Fund receives state subsidies from revenue raised by a tax on foreign casualty insurance (53 P.S. § 895.402, 25-26a), and City of Pittsburgh funds, with the City being its guarantor. 53 P.S. § 23645, 27a. A surviving spouse who was married to a retired participant for at least two years at the time of the participant's death is eligible to receive one half of the participant's monthly benefit, provided that the participant elected a survivor benefit, which any participant may do, regardless of marital status. The participant pays a half percent of his or her salary for survivor benefits. 53 P.S. § 23654.1 - 23654.4, 28-30a.

The officer's pension is not reduced by the election of survivor benefits, but an officer who makes the election after joining the force must make a dues payment retroactive to the date of employment. 53 P.S. § 23654.3, 30a. For this reason, many unmarried officers elect survivor benefits. Transcript of argument on motions for judgment on the pleadings at 18, original record.

Gregory William Adams, a retired City of Pittsburgh police officer, died June 19, 2001. At the time of his death, he was living with Audrey Ross. 37a, 47a. He left no estate. 48a, 50a. Following his death, Ross made inquiry of the Policemens' Relief and Pension Fund of the City of Pittsburgh, and was told "[W]ithout a court order, we don't have any basis to pay you." Transcript of argument on preliminary objections at 8, original record.

Orphans' Court Proceedings[1]

On September 25, 2001, Ross brought a declaratory judgment action, claiming a common law marriage[2] to Adams and naming only him as a defendant. She attempted to file it in the Orphans' Court Division of the Court of Common Pleas, but the clerk of that court refused to accept it for filing. She filed it in the Civil Division. Her pleadings did not state the purpose for which declaratory judgment was sought. She gave notice of the proceeding to Adams' adult daughters from a terminated marriage. They did not formally intervene, but they filed an answer contesting the claim of marriage and were thereafter treated as parties. 49a.

Her counsel, after notice to the daughters' counsel (Matthew E. Fischer, Esquire of Butler, Pennsylvania) presented the Honorable Walter R. Little of the Orphans' Court Division with a motion to schedule a hearing. The motion did not advise the court that the declaration of marital status was being sought for pension purposes. The motion was granted and the case was docketed in the Orphans' Court. Neither the Administrative Judge of the Civil Division nor the Administrative Judge of the Orphans' Court Division approved the transfer. 49a.

At the commencement of the hearing, plaintiff's counsel advised Judge Little that a pension entitlement claim was

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[1]To avoid confusion, this Petition will refer to the proceedings in the first case, which concluded in Orphans' Court, as the "Orphans' Court proceedings" notwithstanding that both cases began in the Civil Division.

[2]As of the time of Adams' death, Pennsylvania recognized common law marriage. It has since been prospectively abolished. 23 Pa. C. S. §1103, 25a *infra*. *See also* Note 1 in the opinion below, 871 A. 2nd at 278, 2a *infra*.

the major reason the action was brought[3], and mistakenly identified the source of the pension as the "FOP" (Fraternal Order of Police). The FOP is the collective bargaining agent for Pittsburgh police officers; it does not pay them retirement benefits. 49-50a. It is not involved in this matter.

Ross' counsel told the court:

> Ms. Ross is not making any claims against the estate, etc. There was virtually no estate. So it's not a claim contrary to any heirs' claims to the estate, etc. It's strictly an action to establish the marriage to qualify for pension benefits as a widow. [50a.]

Adams' daughters, although financially disinterested in the question of the existence of the marriage[4], vigorously opposed the declaration. 38a, 48a.

On August 23, 2002, Judge Little entered a decree finding that a common law marriage had taken place between Ross and Adams. The decree did not order the Fund (or the FOP) to do anything. 50a.

He filed an opinion in support of the decree. He found that Ross and Adams had cohabited for approximately eleven years. 39a. He based his finding of marriage on the cohabitation period and on the following additional evidence:

> 1. Officer Adams' nephew testified that his children referred to Ross as "Aunt Audrey" both verbally and in writing;
>
> 2. Two neighbors of the couple, unrelated to each other, testified that they believed Ross and Adams

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[3]At the oral argument below, Ross' counsel stated that when the action was commenced there was a dispute over Adams' personal effects, and that an agreement had been reached on that issue by the time of trial.

[4]Survivor benefits are payable to Ross or to no one.

were married;

3. Ross' employer testified that he believed Ross and Adams were married, and that Adams would call and ask to speak to his "wife";

4. Ross testified that Adams bought her an engagement ring and a wedding band in December of 1994, and that she purchased a wedding band for him approximately two years later. Ross and Adams always wore their rings. [40-41a.]

While Ross listed her marital status as single on her tax returns, Judge Little felt that this was adequately explained by Adams' tax problems (he had failed to file returns in the past) and his gambling problem. 42a.

Adams' daughters filed no exceptions to the decree and took no appeal. No further activity took place in Orphans' Court. 50a.

Civil Division Proceedings

The Fund was presented with the Orphans' Court decree on or about September 10, 2002; this was its first knowledge of the proceedings. 50a. On September 23, 2002, its solicitor wrote Ross' counsel a letter advising that the Fund did not consider itself bound by the decree. The letter stated, *inter alia*:

> The Fund was not made a party to the action, received no notice of it, and had no opportunity to litigate the issue of whether a common law marriage took place between Ms. Ross and Mr. Adams. [45a.]

The letter also questioned why the action had proceeded in the Orphans' Court Division since it did not involve the

estate of a decedent[5], noting:

> Past practice has been for such matters to be filed in the Family Division and for the Fund to be named as a defendant. [45a.]

On November 6, 2002, Ross filed the instant declaratory judgment action. It referenced the Orphans' Court decree, the participation of Adams' daughters in the Orphans' Court proceedings (describing them as his "heirs"), and the Fund's refusal to pay benefits, which it characterized as "unjustified and in total disregard of a court order[.]" Beyond the foregoing, it did not describe the procedural history of the prior action. 37-38a.

The prayer for relief asked that the Fund be held to be bound by the Orphans' Court declaratory judgment, and be ordered to pay damages and counsel fees based on its refusal to honor the decree. 38a.

On November 18, 2002, the Fund filed preliminary objections in the nature of a demurrer, asserting that it had not been a party to the prior proceeding and could not, accordingly, be bound by the decree.[6]

Ross' Reply to Preliminary Objections, filed January 9, 2003, stated "[The Fund] is not a necessary party to marriages in Pennsylvania or elsewhere."[7]

The preliminary objections were argued January 21, 2003 before the Honorable Judith L. A. Friedman. When the Fund asserted that the enforcement of the Orphans' Court decree against it would be a denial of due process

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[5]Ross relied on 20 Pa. C. S. § 711(19), mandating that issues relating to marriage licenses be decided in Orphans' Court. 34-35a. The Marriage License Bureau has no involvement with common law marriages.

[6]Preliminary Objections, original record.

[7]Answer to Preliminary Objections, original record.

because it had no opportunity to contest the issues, Judge Friedman responded:

> Well, it would only be a denial of due process if it were any of your business, and whether or not they were married is something that we should be aware of, I understand that, but how is it your business? [January 21, 2003 argument transcript at 9, original record.]

Undersigned counsel responded "It's our business because we are being asked to pay her monthly benefit." *Id.* Judge Friedman went on to say "[I]f this decree was back in August, it's a final decree. I don't have any right to question it[.]" [*Id.* at 11.] She indicated that if it turned out that the Fund had "no defense", she would be inclined to award counsel fees. She then advised the Fund that her ruling was law of the case and that the Fund's answer to the complaint "should not include things that were already raised by preliminary objection." *Id* at 12.[8]

The written order stated:

> Defendant's Preliminary Objections are *overruled for the reason set forth in the video record, in particular that the status of the marriage of plaintiff and her deceased husband has been finally decided and Defendant had no standing to object nor to notice of that Orphans' Court proceeding.* [11a; emphasis added.]

The highlighted language was added by hand. The Fund perceived that language to be declaratory and took a protective appeal to the Commonwealth Court pursuant to the decision of the Supreme Court of Pennsylvania in

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[8]Judge Friedman was mistaken about her ruling being law of the case. *Ryan v. Berman*, 572 Pa. 156, 813 A. 2nd 792 (2002). The Fund accordingly considered her admonition against raising the joinder issue in its Answer to be advisory, and rejected the advice.

Nationwide Mutual Insurance Company v. Wickett, 563 Pa. 595, 763 A. 2nd 813 (2000), which holds that orders containing declaratory language must be immediately appealed. In response to that appeal, Judge Friedman filed an opinion expressing the view that the fact of the marriage was res judicata. Note 2, 151 P.L.J. 123, 124, 23 Pa. Fiduciary Reporter 2nd 404, 406, 15a *infra*. The opinion also held, essentially, that a marital status determination is the equivalent of a marriage, and that when such a determination has taken place, "the world, including Defendant, must hold its peace." 151 P.L.J. at 124, 23 Pa. Fiduciary Reporter 2nd at 406, 15a *infra*.

The appeal was quashed as interlocutory on November 26, 2003; the order is reported at 836 A. 2nd 1091. Reconsideration was denied on January 21, 2004, and allowance of appeal was denied on May 13, 2004.

On May 19, 2004, the Fund filed an Answer to Complaint for Declaratory Judgment with New Matter (47a), endorsed with a Notice to Plead. With respect to the marriage, the Answer stated:

> After diligent investigation, defendant does not believe that plaintiff entered into a common law marriage with Mr. Adams, and defendant accordingly denies that Audrey Ross is the widow of Gregory Adams. [48a.]

In other respects, with minor qualifications, it admitted the essential facts set forth in the Complaint. The primary factual qualification was that Adams' daughters were his heirs only in the sense that they would inherit his estate *if he had one*, absent a will providing otherwise, if there were no surviving spouse. 48a. The New Matter set forth the full procedural history of the Orphans' Court proceedings, including the fact that Adams left no estate. It reiterated the lack of joinder or notice. 48-50a.

Ross did not reply to the New Matter. She allowed the

time for responding to expire.[9] She filed a Motion for Judgment on the Pleadings on July 7, 2004. 52-53a. In addition to the pension, she sought interest on the arrears and counsel fees. The Fund filed its own Motion for Judgment on the Pleadings on July 12, 2004. The motion raised the due process issue presently asserted, and challenged the constitutionality of 23 Pa. C. S. § 3306, Pennsylvania's marital status determination statute, which states that a marital status decree binds "all persons concerned." 55a.

The motions were argued before the Honorable Paul F. Lutty, Jr. on August 30, 2004. Judge Lutty granted Ross' motion as to the pension and interest[10] and denied that of the Fund. 16a. The Fund appealed to the Commonwealth Court of Pennsylvania. On September 9, 2004, Judge Lutty issued a supplemental order specifying that the amount due as of August 30, 2004 was $43,380.65 plus interest.[11] 17a. He granted supersedeas on October 1, 2004, waiving security. His opinion adopted the findings of fact and conclusions of law in the Orphans' Court decree. He "was not persuaded that a different legal conclusion would be reached at a second hearing." 19-20a. He found it unreasonable to require Ross to "file a separate and distinct declaratory judgment action against each and every potential party that questions her marriage[] after the issue

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[9]Pennsylvania Rule of Civil Procedure 1026 gave Ross 20 days to respond to the New Matter. Pa. R. C. P. 1029 provides that averments not denied are admitted.

[10]Judge Lutty refused to award counsel fees, and no cross-appeal was taken from that refusal.

[11]The Fund regarded the supplemental order as an amplification of the order granting judgment on the pleadings, and did not take a separate appeal from it. There is no dispute concerning the amount due or the interest computations.

has already been decided by a full adversarial hearing[.]" 20a.

All issues raised herein were raised in the Fund's Motion for Judgment on the Pleadings, in its brief to the Commonwealth Court, and in its allocatur petition.

The Attorney General of Pennsylvania was given notice of the Fund's constitutional challenge in the Commonwealth Court proceedings, and chose not to participate in the proceedings.

The Commonwealth Court panel consisted of President Judge Colins, Judge Simpson, and Judge Leavitt. The panel affirmed the trial court decision, holding that it had not been necessary for Ross to join the Fund in the Orphans' Court action because the Fund had no claim, interest, or right that could have been prejudiced in that proceeding (871 A. 2nd at 280, 5a *infra*), and then ordered the Fund to pay benefits to Ross on the basis of the Orphans' Court decree. 871 A. 2nd at 281, 8a *infra*.

The Fund's Application for Reargument was denied on April 27, 2005. The Fund filed a Petition for Allowance of Appeal; it was denied by the Supreme Court of Pennsylvania on March 8, 2006. The Fund is paying benefits to Ross on an interim basis following the April 17, 2006 refusal of Your Honorable Court, at 05A934, to grant a stay.

The relief the Fund seeks is a holding that it is not bound by the Orphans' Court decree and a remand to the Court of Common Pleas with a directive to treat the complaint as one for declaration of marital status and to hold a *de novo* evidentiary hearing. Recoupment of benefits already paid following refusal of stay will be an issue to be decided at that hearing if the Fund prevails on the question of marriage.

REASONS FOR GRANTING THE WRIT

I. Joinder as a Prerequisite to Binding

a. Fourteenth Amendment Personhood of the Fund

There is a subsumed threshold issue in this case: is the Fund a person for purposes of the Due Process Clause of the Fourteenth Amendment? The Fund submits that it is a person entitled to procedural due process in state court proceedings.

The Fund recognizes that the primary purpose of both Due Process Clauses was to protect individuals from abuses of the power of government, and that states are not persons for this purpose. *South Carolina v. Katzenbach*, 383 U.S. 301, 86 S. Ct. 803, 15 L. Ed. 2nd 769 (1966). The status of cities under the Fourteenth Amendment Due Process Clause was most recently addressed in *Risty v. Chicago*, 270 U.S. 378, 46 S. Ct. 236, 70 L. Ed. 641 (1926), wherein Your Honorable Court stated:

> The power of the State and its agencies over municipal corporations within its territory is not restrained by the provisions of the Fourteenth Amendment. [*Id.* at 390, 46 S. Ct. at 241, 70 L. Ed. at 651.]

Accord: *Trenton v. New Jersey*, 262 U.S. 182, 43 S. Ct. 534, 67 L. Ed. 937 (1923); *Hunter v. City of Pittsburgh*, 207 U.S. 161, 28 S. Ct. 40, 52 L. Ed. 151 (1907).

Some years later, however, in *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S. Ct. 125, 5 L. Ed. 2nd 110 (1960), Your Honorable Court clarified its position:

> [A] correct reading of the seemingly unconfined dicta of *Hunter* and kindred cases is not that the State has plenary power to manipulate in every

> conceivable way, for every conceivable purpose, the affairs of its municipal corporations[.] [*Id.* at 344, 81 S. Ct. at 128, 5 L. Ed. 2nd at 115.]
>
> [T]he Court has never acknowledged that the States have the power to do as they will with municipal corporations regardless of consequences. Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution. [*Id.* At 344-45, 81 S. Ct. at 128-29, 5 L. Ed. 2nd at 115.]

Hunter and its progeny involved lawsuits by cities claiming substantive due process violations; the cases do not address procedural due process in the context or judicial proceedings. No decision of Your Honorable Court has foreclosed recognition of procedural due process protection for governmental entities, whether under the Fifth Amendment or the Fourteenth.[12]

The Fund's slice of state power is but a sliver. It does not wield the power of a municipal corporation or other political subdivision of the state. It does not levy taxes. It has no general governmental powers and no ability to oppress citizens; the only individuals whose lives it affects are active and retired Pittsburgh police officers and their eligible family members. The observations of Judge Becker of the Third Circuit in *In re Real Estate Title and Settlement*

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[12] *See* Lawrence, *Do "Creatures of the State" Have Constitutional Rights?: Standing for Municipalities to Assert Procedural Due Process Claims Against the State*, 47 Villanova Law Review 93 (2002). Professor Lawrence argues that municipal corporations have standing to assert procedural due process claims against their creating states for the deprivation of certain liberty and property interests that do not involve substantive matters of the state's internal political organization. The Fund has no complaint about Pennsylvania's internal political organization, and does not seek to sue any other governmental entity. The Fund simply wants to be treated fairly in judicial proceedings.

Services Antitrust Litigation, 869 F. 3rd 760 (3rd Cir. 1989), wherein it held that school boards were persons entitled to due process, are on point:

> [T]his is a due process claim -- the school boards argue that it would violate the Fifth Amendment's guarantee of due process for a federal court to enjoin them when they have not had minimum contacts with the forum. Although the Supreme Court has held that states are not persons within the meaning of the Fifth Amendment and thus are not entitled to due process protections, see [*Katzenbach*], we believe that the school boards are persons within the meaning of the Fifth Amendment due process clause. Although they may derive their funding from the state, we think that the school districts, whom the school boards represent, are more like private corporations -- which can be persons under the due process clause -- than like states.... Like corporations, and unlike states, the school districts are limited bodies which exist for a particular and circumscribed purpose. [*Id.* at 765, Note 3.]

The same is true of the Fund, and the "circumscribed purpose" of the Fund is undermined when it is deprived of a fair opportunity to contest a claim of entitlement to benefits. The Fund relies on long-recognized due process limitations on issue preclusion, and notes that, with exceptions not material here,[13] the analysis undertaken by Your Honorable Court in issue or claim preclusion cases has been no different when the arguably precluded party was a governmental body, *Montana v. United States*, 440 U.S. 147, 99 S. Ct. 970, 59 L. Ed. 2nd 210 (1979); *Nev v. United States*,

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[13]See *United States v. Mendoza*, 464 U.S. 154, 104 S. Ct. 568, 78 L. Ed. 2nd 379 (1984), wherein Your Honorable Court took an expansive view of the right of the United States to relitigate issues.

463 U.S. 110, 103 S. Ct. 2906, 77 L. Ed. 2nd 509 (1983). In each of these cases, Your Honorable Court, prior to holding that the Government was precluded, determined that the Government had had an opportunity to litigate the issue or claim in question. *See also Blodgett v. Silberman*, 277 U.S. 1, 48 S. Ct. 410, 72 L. Ed. 749 (1928), which involved a full faith and credit issue, and in which Your Honorable Court held that Connecticut was not bound by New York proceedings to which it was neither party nor privy. It is implicit in these decisions that the opportunity to litigate before being bound is a part of due process so basic that even governmental bodies are entitled to it.

b. Due Process Principles

In the proceedings below, including its Commonwealth Court brief (30-32a), the Fund discussed a number of decisions of Your Honorable Court standing for the proposition that judgments only bind parties:

> The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger. . . . Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights. [*Chase National Bank v. Norwalk*, 291 U.S. 431, 441, 54 S. Ct. 475, 479, 78 L. Ed. 894, 901 (1934).]
>
> It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. [*Hansberry v. Lee*, 311 U.S. 32, 40, 61 S. Ct. 115, 117, 85 L. Ed. 22, 26 (1940).]

> For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." [*Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S. Ct. 1983, 1994, 32 L. Ed. 2nd 556, 569 (1972); citation omitted.]
>
> A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings. [*Martin v. Wilks*, 490 U.S. 755, 762, 109 S. Ct. 2180, 2185, 104 L. Ed. 2nd 835, 844-45 (1989); footnote omitted.]

The Fund's brief also discussed (32a) the only prior Pennsylvania appellate decision dealing with the effect of a declaratory judgment of marriage on nonparties, *Allison Park Contractors, Inc. v. Workers' Compensation Appeal Board*, 731 A. 2nd 234 (Pa. Cmwlth. 1999). The declaratory judgment action had been resolved with a consent decree between the putative widow and the decedent's parents, and the Commonwealth Court held that it was not binding in the subsequent Workers' Compensation proceeding. The decision emphasized that nothing had been litigated, but included two footnotes to the effect that collateral estoppel was only applicable to parties. 731 A. 2nd at 236, 237, Notes 2 and 3. The court noted that the employer had not been a party to the first proceeding. *Id.* at 237.

In the decision sub judice, the Commonwealth Court stated:

> To support its contention that it is not bound by the Orphans' Court order declaring that Ross and Adams were married at common law, the Fund relies *solely*

> on our decision in [*Allison Park*][.][14] [871 A. 2nd at 279, 3a *infra*; emphasis added.]

The court then stated that the *Allison Park* decision *supported* binding the Fund. It did not explain how, and it did not mention the collateral estoppel footnotes in *Allison Park*.

The Fund cited the joinder provisions of Pennsylvania's Declaratory Judgment Act, 42 Pa. C. S. § 7540(a) to-wit:

> (a) GENERAL RULE. – When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding[.][15]

The Commonwealth Court opinion quotes the foregoing and then states:

> The Fund does not tell us what claim or interest it may have had in the Orphans' Court proceeding or what right it may have possessed that could have been prejudiced in that proceeding. [871 A. 2nd at 280, 5a *infra*.]

The Fund is at a complete loss to understand how it can

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[14]This statement is grossly inaccurate. Lest there be any question as to whether the issue was developed below, the Appendix includes excerpts from the Fund's Commonwealth Court brief. 32-35a.

[15]The next subsection, 42 Pa. C. S. §7540(b), states:

> (b) TAX MATTERS. – In any proceeding which involves the effect of any asserted *legal relation, status*, right, or privilege upon the determination of any tax, the appropriate taxing authority shall be served with a copy of the proceeding, but if such taxing authority does not enter its appearance, the requirements of this section shall nevertheless be satisfied if the court considers that the interests of the taxing authority are adequately represented. [Emphasis added.]

The Fund is not a taxing body. The general rule is accordingly applicable.

be told that its rights could not have been prejudiced in a proceeding, and then be ordered to pay someone benefits on the basis of the outcome of that proceeding.[16] The Fund has a responsibility to its participants and to its known and future beneficiaries to challenge claims whose validity it doubts, thus preserving its assets in order to meet its statutory obligations.[17]

Judge Lutty's rationale for binding the Fund was as follows:

> After a full hearing on the matter ... [Judge Little] ...issued a well-reasoned Opinion and Decree ruling that Plaintiff and Decedent were indeed married.
>
> . . . .
>
> This Court accepted and now hereby adopts the findings of fact and conclusions of law in Judge Little's Opinion and Decree. Based on such, this Court was simply not persuaded that a different legal conclusion would be reached with a second hearing. [19-20a.]

What Judge Lutty thought would happen at a new hearing is speculative and irrelevant. As Your Honorable Court stated in *Nelson, supra* Note 16:

> [J]udicial predictions about the outcome of hypothesized litigation cannot substitute for the actual opportunity to defend that due process affords every party against whom a claim is stated. [*Id.* at 471, 120 S. Ct. at 1587, 146 L. Ed. 2nd at 541.]

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[16] *Compare Nelson v. Adams USA*, 529 U.S. 460, 468, 120 S. Ct. 1579, 1585, 146 L. Ed. 2nd 530, 539 (2000), particularly Note 2 and accompanying text.

[17] The effect of the Fund's fiduciary status on the due process question is discussed more fully in subsection 4 of this argument, Fiduciaries and Due Process, 24 *infra*.

Accord: Carey v. Piphus, 435 U.S. 247, 98 S. Ct. 1042, 55 L. Ed. 2nd 252 (1978) (right to due process is absolute in the sense that it does not depend upon the merits of a claimant's substantive assertions); *Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S. Ct. 2633, 159 L. Ed. 2nd 578 (2004) (same).

The Fund also relies on *Blonder-Tongue Laboratories v. University of Illinois Foundation*, 402 U.S. 313, 91 S. Ct. 1434, 28 L. Ed. 2nd 788 (1971) and *Parklane Hosiery Company v. Shore*, 439 U.S. 322, 327, 99 S. Ct. 645, 649, 58 L. Ed. 2nd 552, 560 (1979). In *Blonder-Tongue*, Your Honorable Court stated:

> Some litigants -- those who never appeared in a prior action -- may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position. [*Id.* at 329, 91 S. Ct. 1443, 28 L. Ed. 2nd at 799; citations omitted.]

Parklane Hosiery is to the same effect:

> It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard. [*Id.* at 327, 99 S. Ct. At 649, 58 L. Ed. 2nd at 560; citations omitted.]

Martin, supra involved plaintiffs who were challenging the conclusiveness of the decree entered in a prior action about which they had known and in which they had chosen not to intervene. Your Honorable Court noted that, under limited circumstances, notice and opportunity to intervene may satisfy due process:

> [W]here a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate, legal

> proceedings may terminate preexisting rights *if the scheme is otherwise consistent with due process. See National Labor Relations Board v. Bildisco and Bildisco*, 465 U.S. 513, 529-30, n.10, 104 S. Ct. 1188, 1198, n. 10, 79 L. Ed. 2nd 482, 498, n. 10 (1984) ("[P]roof of claim must be presented to the Bankruptcy Court . . . or be lost"); *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S. Ct. 1340, 99 L. Ed. 2nd 565 (1988) (nonclaim statute terminating unsubmitted claims against the estate). . . . [*Id.* at 762, 109 S. Ct. at 2185, 104 L. Ed. 2nd at 844-45; emphasis added.]

The examples above both involve proceedings of a type traditionally classified as *in rem*; they both present situations where finite assets under the control of the court are to be distributed. Both involve proceedings in which there is some provision for notice to nonlitigants. Creditors are notified in a bankruptcy. Personal representatives must give notice of the proposed distribution to claimants against an estate, and notice by publication has been held inadequate with respect to known claimants. *Tulsa, supra.*

Pennsylvania's General Assembly, with the exception of the special provision for taxing bodies in the Declaratory Judgment Act[18], has not seen fit to create any "special remedial scheme" dispensing with joinder where proving marriage is concerned, at least not one that comports with due process notice requirements.[19] Such a scheme might be useful when multiple entities have peripheral interests in the marital status of a couple, such as commercial entities that engage in business dealings with either or both of the

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[18]Note 15, *supra.*

[19]Pennsylvania's marital status determination statute is discussed more fully in Argument II, 27a *infra.*

partners. The impact on such entities of a marital status decree relates to their future remedies; it does not require them to pay money to anyone. *Martin*, however, does not support dispensing with joinder where the consequence of finding a marriage is to impose an immediate and open-ended financial obligation on any individual or entity. It doesn't get any more *in personam* than that.

Martin also makes clear that the Fund was under no duty to take action in Orphans' Court after learning of the decree. Under Pennsylvania law, one not bound by an order is not aggrieved by it and may not appeal it. *Beers v. Unemployment Compensation Board of Review*, 534 Pa. 605, 633 A. 2nd 1158 (1993). Orphans' Court did not attempt to bind the Fund. It did not order anyone to do anything. The Fund was annoyed to learn of the decree. It was not, strictly speaking, aggrieved.

Had Orphans' Court ordered the Fund to pay benefits, the Fund might have been able to appeal. *Walker v. Walker*, 523 A. 2nd 782 (Pa. Super. 1987). It would have been under no duty to do so. In *Alemite Manufacturing Corporation v. Staff*, 42 F. 2nd 832 (2nd Cir. 1930), the Honorable Learned Hand observed:

> [N]o court can make a decree which will bind any one but a party; a court of equity is as much so limited as a court of law; it cannot lawfully enjoin the world at large, no matter how broadly it words its decree. If it assumes to do so, the decree is *pro tanto brutum fulmen*[20], and the persons enjoined are free to ignore it. [*Id.* at 832.]

The applicable due process principles are clear,

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[20] "So much empty noise." Black's Law Dictionary 207, 1259 (8th ed. 2004). "Brutum fulmen" is Latin for "inert thunder." *Id* at 207. Notwithstanding the teaching of *Alemite*, in this case the Fund has been thundering about due process with recurring inertitude.

notwithstanding that not one of the judicial opinions in this case has acknowledged them. The real question is whether some special circumstance of this case excuses compliance with them, a matter the Fund will proceed to address.

c. Marital Status Determinations and Due Process

Judge Friedman's opinion concludes with the following *ipse dixit*:

> This Court had, and has, the view that just as the world need not attend a marriage for it to be valid, once a judge has finally ruled there was one, the world, including Defendant, must hold its peace. [151 P.L.J. 124, 23 Pa. Fiduciary Reporter 2nd at 406, 15a *infra*.]

The Fund respectfully submits that a *finding* of marriage, particularly one made posthumously, is not an event comparable to a marriage. Reliance interests of living parties to a putative marriage may complicate the question of what right a third party should have to challenge a decree declaring a marriage. However, no such interests are implicated when death has terminated any marriage that existed and the only issue is whether a particular third person or entity has a monetary obligation to the survivor.

The Commonwealth Court also equated a marital status decree to a marriage record, stating:

> Nowhere in its brief does the Fund explain the crucial distinction between the declaration of marriage that Ross produced and the marriage certificates that evidence the marriages of the many widows and widowers to whom the Fund is paying benefits today. It is a distinction without a difference. Ross was married to Adams under our law as surely as if she had married him in a formal ceremony after

> securing a valid license, and the Fund may not treat her any differently. [871 A. 2nd at 280, 6a *infra*.]

The distinction is, in fact, crucial. The creation and the after-the-fact declaration of a marriage are two very different things.

A marriage ceremony creates a new marital status for the participants. Absent some indication of an impediment, the authenticated record of such a ceremony is conclusive evidence of the marriage. No factfinding is involved.

By contrast, the attempt of a court to determine whether a common law marriage took place between two people is an effort to reconstruct past events from testimony. It is particularly difficult when one partner to the alleged marriage has died. It is a factfinding process in which all persons directly affected by the outcome are entitled to participate. Its outcome does not change anyone's marital status; neither a judge nor anyone else has the power to join a living person in matrimony with a dead one.

Judge Lutty and the Commonwealth Court panel expressed concerns about multiplicity of parties. Judge Lutty stated:

> [T]o require Plaintiff to file a separate and distinct declaratory judgment action against each and every potential party that questions her marriage, after the issue has already been decided by a full adversarial hearing, is plainly unreasonable. [20a.]

The Fund does not argue that Ross should have filed separate and distinct declaratory actions. Any duplication of effort is the result of Ross' own failure to join the Fund in the first action. The actions Ross took to get her cause heard, although acquiesced in by Adams' daughters and by Judge Little, reflected an ad hoc approach and were not undertaken in reliance on any established court procedure. The only defendant she named was Adams. A dead man cannot be a party to an action, and any such attempted

proceeding is completely void and of no effect. *Montanya v. McGonegal*, 757 A. 2nd 947 (Pa. Super. 2000). The daughters were never actually joined. In reality, the first action was a one-party lawsuit with guest participation.

The Commonwealth Court stated:

> [The Fund's argument] leads to the absurd conclusion that every person or entity who must rely on the fact of the marriage of two persons must be a party to the creation or declaration of that marriage. [871 A. 2nd at 280, 5a *infra*.]

The list of persons or entities that need to rely on the fact of a *terminated* marriage is ordinarily short and eminently manageable. To require their joinder, at least when the surviving partner wants money from them, does not impose an undue burden. Here, there is no other known person or agency other than the Fund who could incur a financial obligation to Ross on the basis of her claimed marriage to Adams. If there is, in fact, a "too much trouble" exception to the Due Process Clause, this is not the appropriate case to invoke it.

The best judicial response to the opinions below is that of the Supreme Court of California in the case of *Schmidt v. Retirement Board of San Francisco*, 44 Cal. Rptr. 2nd 297 (Cal. Ct. App. 1995). In *Schmidt*, a woman claimed to be the widow of a retired county employee. Pursuant to a procedure designed to correct omissions in public records, she obtained an ex parte order declaring her to be the deceased employee's widow. At an administrative hearing on the question of her status, she took the position that the order was binding. The administrative law judge rejected this argument and found that no marriage had occurred. She then sought a writ of mandate directing that the administrative decision be reversed. The trial court granted the writ. Here is what the Court of Appeals said:

> The trial court determined that the marriage order

> was conclusive . . . , reasoning that if such orders were not conclusive, a party would be subject to the possibility of inconsistent and conflicting determinations regarding an issue that may govern the rights and duties not only of that party, but of third parties. We are persuaded, however, that the possibility of inconsistent and conflicting determinations does not warrant giving conclusive weight to ex parte judicial orders . . . when to do so would threaten the due process rights of third parties. [*Id.* at 302.]

d. Fiduciaries and Due Process

In the Commonwealth Court, Ross argued that no deprivation of property took place because the Fund had no property rights in the assets it holds. She further argued that as a beneficiary she was the one with a property interest in the Fund. Brief for Appellee at 4, 57a *infra*. This argument is circular; for Ross to be a beneficiary she must be Adams' widow, an issue with respect to which the Fund has not yet had its day in court.

The Fund's standing to complain of a due process violation is analogous to the standing of trustees to appeal court decisions that jeopardize the interests of those whom they represent. *See Annotation*, Trustee's Right to Appeal, 6 A.L.R 2nd 147 (1949), at § 4, page 152:

> Where the order of judgment affects or threatens the very existence, validity, or continuance of the trust, or prevents the trustee from discharging his duties under the trust, or depletes the trust fund by allowance of unreasonable or unfounded claims against it, the trustee, though having no personal interest in the litigation, is not a disinterested party. In such case he, in his fiduciary or representative

> capacity, is aggrieved by the judgment or order, and may appeal therefrom, whether the litigation is between the beneficiaries themselves or between the trust and third parties.

Allowance of an unfounded claim depletes Fund assets, to the detriment of those actually entitled to benefits.

The Fund relies on a number of cases decided consistently with the annotation: *Estate of Ferrall*, 200 P. 2nd 1 (Cal. 1948); *Waterbury Trust Company v. Porter*, 35 A. 2nd 837 (Conn. 1944); *O'Leary v. McGuinness*, 98 A. 2nd 660 (Conn. 1953); *In re Fleet National Bank's Appeal from Probate*, 837 A. 2nd 785 (Conn. 2004); *Retail Store Employees Union v. Washington Surveying and Rating Bureau*, 558 P. 2nd 215 (Wash. 1976). In *Fleet National Bank*, the Supreme Court of Connecticut stated:

> We have concluded that "[o]ne serving in a fiduciary capacity has standing to appeal from any decree which adversely affects the interests of those for whom he is acting, if it is a part of his duty to protect those interests." (Internal quotation marks omitted.) [Citations omitted.] . . . [A] party sufficiently has demonstrated classical aggrievement upon a showing of direct injury to a legally protected interest, either in the sense of personal harm or harm to the interests of one for whom the party stands in a representative capacity, regardless of the extent of the harm. [*Id.* at 799.]

In *O'Leary*, the court noted:

> A trustee of a charitable trust has a special duty to protect the interests of the beneficiaries because the real beneficiaries are unascertainable and therefore unable to protect themselves. [*Id.* at 664; citation omitted.]

The future beneficiaries of the Fund are likewise unascertainable and unable to protect their own interests.

An analogy may also be drawn to the standing of public pension fund administrators to contest claims for disability benefits even in the face of adverse findings in Workers' Compensation proceedings. In *Day v. New Hampshire Retirement System*, 635 A. 2nd 493 (N.H. 1993), the court held:

> We hold that because of the distinct identity, constituency and interests of the retirement system, it is not in privity with executive agencies of the state[.] . . .We place great weight on the fact that the retirement system is a contributory one and that the impact of disbursements may be felt by all participating employers and employees in the form of increased contribution rates and the threat to the solvency of the fund. Thus, even assuming that the State's interests were well-represented in the department of labor proceedings, the same cannot be said of the interests of the members of the retirement system, nor of the many contributing employers other than the State. Because the interests of those other parties were unrepresented before the department of labor, we hold that application of collateral estoppel to the retirement system was error. [*Id.* at 497.]

In *Traub v. Board of Retirement*, 670 P. 2nd 335 (Cal. 1983), the court reached the same conclusion, observing

> [A]ny adjudication of a claim for benefits may have economic impact upon the membership of the association as well as upon the treasury of the county and participating political entities. [*Id.* at 684; citations omitted.]

Accord: *Bianchi v. City of San Diego Retirement Board of Administrators*, 262 Cal. Rptr. 566 (Cal. Ct. App. 1989); *Palmer v. Municipality of Anchorage, Police and Fire Retirement Board*, 65 P. 3d 832 (Alaska 2003); *Demski v. Mundelein Police Pension Board*, 831 N.E. 2d 704 (Ill. App.

Ct. 2005).

The Fund does not get to enjoy its money in the way that an individual does. That hardly makes it incapable of suffering a deprivation of property. If the Fund does not have standing to dispute a claim whose validity it questions, no one does. The gatekeeping function performed by its managers is worthy of due process protection.

II. Pennsylvania's Marital Status Determination Statute

At first blush, 23 Pa. C. S. § 3306[21] (Proceedings to determine marital status), seems to be in conflict with the joinder requirements of the Declaratory Judgment Act; it states:

> When the validity of a marriage is denied or doubted, either or both of the parties to the marriage may bring an action for a declaratory judgment seeking a declaration of the validity or invalidity of the marriage and, upon proof of the validity or invalidity of the marriage, the marriage shall be declared valid or invalid by decree of the court and, unless reversed upon appeal, the declaration shall be conclusive upon all persons concerned.

Section 3306 was a small part of a historic divorce reform measure, and was at least primarily concerned with uncertain marriages to which both parties are living. It serves several purposes:

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[21]This provision was originally 23 P.S. § 206. At the time of its enactment, the use of declaratory judgment to resolve disputes that included questions of fact was fairly new: *Liberty Mutual Insurance Company v. S.G.S. Company*, 456 Pa. 94, 318 A. 2nd 906 (1974). Declaratory judgment was, nonetheless, occasionally used to establish surviving spouse status. *Taubel Estate*, 21 Pa. D. &. C. 2nd 446 (1960).

> (1) making clear that recognition of a marriage is an appropriate purpose for declaratory judgment, and that denial or doubt as to its existence satisfies the case-or-controversy requirement;
>
> (2) encouraging individuals in murky marital situations to seek clarification and closure sooner rather than later; and
>
> (3) warning marital status litigants (and their privies) that the same standards of finality will apply as in any other civil action, thereby dispelling any expectation that a losing litigant who does not appeal may later revisit the issue.

Any doubt that actions under § 3306 are governed by the Declaratory Judgment Act was removed by the December 19, 1990 amendment to the Act, which added the highlighted language to 42 Pa. C. S. § 7541(c):

> Exceptions.--Relief shall not be available under this subchapter with respect to any:
>
> > 1. Action wherein a divorce or annulment of marriage is sought *except as provided by 23 Pa. C. S. § 3306 (relating to proceedings to determine marital status).* [Emphasis added.]
>
> . . . .

The restriction that this amendment removed would be irrelevant in the case of a putative surviving spouse. Moreover, a person seeking to be formally declared someone's widow or widower is usually bringing the action to resolve a dispute over money or other property, and the case-or-controversy requirement presents no problem. The intended beneficiaries of § 3306 are parties to existing marriages. There is nothing in § 3306 to suggest that Pennsylvania's legislature contemplated or foresaw its use to establish surviving spouse status; the Divorce Code would be an odd place for a procedure to establish such status. *If* there is a

class of marital status litigants to whom the General Assembly intended to give the ability to bind the world, it is those whose putative spouses are still living and who have a particularly compelling need for finality.[22]

The Fund doubts, however, that the legislature intended this with respect to *any* class of litigants. Section 3306 is silent on joinder; indeed, it does not even specify that the plaintiff should join the other putative spouse, nor does it state who is to be named as a defendant when both partners bring the action. This would suggest that the legislature intended for the joinder standard set forth in the Declaratory Judgment Act to apply; it is hard to believe that the legislature intended for the world to be bound regardless of who is joined.[23] The Fund respectfully submits that the finality language with which § 3306 concludes presupposes compliance with the Declaratory Judgment Act, and that it should be construed as a shorthand reference to those persons whose joinder is required under § 7540(a) of that Act. This interpretation reconciles § 3306 with the Due Process Clause.

If, in fact, § 3306 of the Divorce Code permits the enforcement of a posthumous[24] decree of marriage against a

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[22]A person who may or not be presently married may need to know whether he or she may marry someone else without obtaining a divorce. This problem does not exist when one partner has died.

[23]Even Ross does not so contend. Rather, her position is that when one partner is deceased the heirs of that partner are the only necessary parties to the declaratory judgment action. 38a. However, the statute says nothing about heirs.

[24]The Fund does not concede that no constitutional barrier to enforcement of a marital status decree against a stranger exists when the marital status action is litigated during the joint lifetime of the couple. The equities will vary with the circumstances. The question may be reserved until a case presents it. This case does not.

nonparty to the action in which it was entered -- particularly a nonparty who had no knowledge of the action -- it violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution for the reasons set forth herein.

CONCLUSION

In this case, a respected appellate court, speaking through its President Judge, has rendered a decision that jeopardizes the fiscal interests of public employee pension funds throughout Pennsylvania. It sanctions an end-run approach to establishing eligibility for benefits. That approach violates core due process principles that Your Honorable Court has consistently upheld. Where surviving spouse benefits are concerned, it puts pension funds in the position of relying on relatives of deceased participants to protect their interests.

The proper administration of pension funds, public or private, is a matter of public importance. Giving fund managers the ability to challenge the validity of claims whose legitimacy they doubt is crucial to their fulfillment of their fiduciary responsibilities and helps to assure the survival of pension plans. Certiorari is accordingly appropriate.

Respectfully submitted,

Norma Chase
James A. Wymard
Counsel for Petitioner

APPENDIX

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

Audrey Ross,
Appellee
v.
Policemen's Relief and Pension Fund
of the City of Pittsburgh,
Appellant

No. 1882 CD 2004
Argued: February 1, 2005

BEFORE:
Honorable James Gardner Colins, President Judge
Honorable Robert Simpson, Judge
Honorable Mary Hannah Leavitt, Judge

OPINION BY PRESIDENT JUDGE COLINS

FILED: February 25, 2005

The Policemen's Relief and Pension Fund of the City of Pittsburgh (Fund) appeals from two orders of the Court of Common Pleas of Allegheny County (trial court) that require the Fund to pay surviving spouse benefits to Audrey Ross (Ross). We affirm the trial court.

Ross and Gregory William Adams (Adams) cohabited for approximately 11 years. Adams, a beneficiary of the Fund, died on June 19, 2001. When Ross applied to the Fund for surviving spouse benefits she was told that she would have to prove to the Fund that she and Adams were married.

Ross subsequently secured an order from the Orphans' Court Division of the trial court declaring that a common law marriage[25] had existed between herself and Adams. The order, dated August 23, 2002, was issued after a full evidentiary hearing in which the issuance of the order was opposed by Adams' daughters from a previous marriage. The Fund refused to recognize the marriage on the ground that it had not been a party to the Orphans' Court proceeding.

On November 15, 2002, Ross filed a declaratory judgment action against the Fund in the trial court asking for a decree requiring the Fund to recognize her marriage to Adams, provide surviving spouse benefits retroactive to June 19, 2001, pay attorney fees and costs, and award such other relief as the court might deem just. The Fund filed preliminary objections alleging that the complaint failed to state a cause of action on the ground that the Fund could not be bound by a decree entered in another proceeding. The trial court overruled the Fund's objections, concluding that the marriage of Ross and Adams had been "finally decided" and that the Fund had "no standing to object nor to notice of [sic] that Orphans' Court proceeding." The Fund appealed the overruling of its objections to this Court; the appeal was quashed in an opinion and order filed on November 25, 2003 by Senior Judge James R. Kelley. The

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[25]This Court abolished common law marriage prospectively in the Commonwealth in our decision in PNC Bank Corp. v. Workers' Compensation Appeal Board (Stamos), 831 A. 2nd 1269 (Pa. Cmwlth. 2003). This decision was disagreed with by our Superior Court in Bell v. Ferraro, 2004 PA Super 144, 849 A. 2nd 1233 (Pa. Super. 2003), and our Superior Court declined to extend our decision in Stackhouse v. Stackhouse, 2004 PA Super 427, 862 A. 2nd 102 (Pa. Super. 2004). Our Supreme Court has not addressed the issue but we look forward to the day that it has the opportunity to reconcile this division between our Courts.

Fund filed an answer with new matter in the trial court, and both parties moved for judgment on the pleadings. The trial court granted judgment in favor of Ross in an order dated August 30, 2004. That order directed the Fund to pay widow benefits to Ross "retroactive to June 19, 2001 plus interest and to make regular payments during her lifetime." In a supplemental order dated September 7, 2004, the trial court determined that "the amount of widow benefits due as of August 30, 2004 is $ 43,380.65, plus interest." The trial court granted supersedeas in an order dated October 1, 2004. This appeal followed.

The questions we are asked to determine are 1) whether the Fund is bound by the declaratory judgment of common law marriage in this matter where it was not a party to the proceeding; 2) whether Section 3306 of the Divorce Code, 23 Pa. C. S. § 3306, is constitutional where it permits a person neither joined in a proceeding nor notified of it to be bound by the result; and 3) if the Fund is required to pay benefits, whether it should be required to pay interest.[26]

To support its contention that it is not bound by the Orphans' Court order declaring that Ross and Adams were married at common law, the Fund relies solely on our decision in Allison Park Contractors, Inc. v. Workers' Compensation Appeal Board (Wagner), 731 A. 2nd 234 (Pa. Cmwlth. 1999), petition for allowance of appeal denied, 561 Pa. 678, 749 A. 2nd 472 (2000), in which, the Fund says in its brief, this Court "held that a determination of marital status made in the Court of Common Pleas of Allegheny County was not binding on the employer." This is simply not what we said in Allison Park. In Allison Park, a woman

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[26]We are asked to review questions of law; accordingly our standard of review is de novo and our scope of review is plenary. The Medical Shoppe Ltd. v. Wayne Memorial Hospital, 866 A. 2nd 455, 2005 Pa. Commw. LEXIS 10, 2005 WL 32705 (Pa. Cmwlth. No. 1252 C.D. 2004, filed January 7, 2005).

made a claim for workers' compensation death benefits. In support of her claim, she submitted a copy of an order entered in the Court of Common Pleas of Allegheny County by which she and the parents of the deceased consented to treat the relationship between herself and him as that of husband and wife for the purpose of settling his estate. We agreed with the Employer's contention that that consent order was not binding upon the parties in the workers' compensation proceeding because "there was no evidentiary hearing and adjudication by the common pleas court that Claimant was the common law wife of the Decedent." 731 A. 2nd at 236. The document that Ross has presented to the Fund in this case, however, is an order issued after an "evidentiary hearing and adjudication by the common pleas court" and not a consent order. Allison Park supports the proposition that the order Ross secured from the trial court in this matter declaring that she and Adams were married at common law is binding upon the parties to this litigation. Therefore, we conclude that the order of the trial court dated August 23, 2002 that declares that Ross and Adams were married at common law is binding upon the Fund.

We are not dissuaded from this conclusion by the Fund's argument, based on Section 7540(a) of the Declaratory Judgments Act, 42 Pa. C. S. § 7540(a), and Section 3306 of the Divorce Code, 23 Pa. C. S. § 3306, that Ross was required to join it in the original Orphans' Court action.

Section 3306 of the Divorce Code states,

> When the validity of a marriage is denied or doubted, either or both of the parties to the marriage may bring an action for a declaratory judgment seeking a declaration of the validity or invalidity of the marriage and, upon proof of the validity or invalidity of the marriage, the marriage shall be declared valid or invalid by decree of the court and, unless reversed upon appeal, the

> declaration shall be conclusive upon all persons concerned.

The Fund tells us that the phrase "all persons concerned" is "a shorthand reference to those persons whose joinder is required under Section 7540(a) of the Declaratory Judgment Act, 42 Pa. C. S. § 7540(a), that states, in pertinent part,

> When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.

What the Fund does not tell us is how it reaches that conclusion. The Fund does not tell us what claim or interest it may have had in the Orphans' Court proceeding or what right it may have possessed that could have been prejudiced in that proceeding. The Fund does continue at some length in its brief to convince us that all persons are guaranteed due process of law under both the Pennsylvania and the United States Constitutions. We agree completely with that assertion, but we disagree with the Fund's argument that Section 3306 of the Divorce Code is unconstitutional if it permits the enforcement of a declaration of marriage issued in an action to declare the existence of a common law marriage against an individual or entity not a party to the proceeding in which the decree was issued. Our General Assembly does not intend an absurd result, 1 Pa. C .S. § 1922(1), and the Fund's interpretation of Section 3306 leads to the absurd conclusion that every person or entity who must rely on the fact of the marriage of two persons must be a party to the creation or declaration of that marriage. Nowhere in its brief does the Fund explain the crucial distinction between the declaration of marriage that Ross produced and the marriage certificates that evidence the marriages of the many widows and widowers to whom the

Fund is paying benefits today. It is a distinction without a difference. Ross was married to Adams under our law as surely as if she had married him in a formal ceremony after securing a valid license, and the Fund may not treat her any differently. There is simply no basis in law or fact for the Fund's constitutional challenge to Section 3306 of the Divorce Code.

The Fund relies on our decision in Hutchinson v. Pennsylvania State Employes' Retirement Board, 738 A. 2nd 7 (Pa. Cmwlth. 1998), petition for allowance of appeal denied, 562 Pa. 676, 753 A. 2nd 821 (2000), to explain why it should not be required to pay interest to Ross. We find the Fund's reliance misplaced. In Hutchinson, we explained that interest is "impliedly payable as compensation to a creditor for delay of payment by the debtor whenever a liquidated, or fixed, sum of money is unjustly withheld." Id. at 12, quoting Braig v. Pennsylvania State Employes' Retirement Board, 682 A. 2nd 881, 886. The two prerequisites to the running of interest, we said, were that "the debt must have been liquidated with some degree of certainty and the duty to pay it must have become fixed." Id. The Fund says that its duty to pay interest becomes fixed when a court determines Ross to be the widow of Adams in a proceeding in which it is joined, or when is it finally determined that it is bound by the Orphans' Court decree of marriage. We disagree. The debt to Ross is fixed with actuarial certainty, and the duty to pay it arose by law and by the order of the trial court of August 30, 2004 as the date Adams died, June 19, 2001.

Accordingly, the order of the Court of Common Pleas of Allegheny County dated August 30, 2004 directing the Fund to pay benefits retroactive to June 19, 2001, plus interest, and the order of that court dated September 7, 2004, finding that the amount owed to Ross as of August 30, 2004, to be $ 43,380.65, plus interest, are affirmed, and this matter is remanded to the trial court solely for the

calculation of the additional amount of principal and the interest owed to Ross.

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

Audrey Ross,
Appellee
v.
Policemen's Relief and Pension Fund
of the City of Pittsburgh,
Appellant

No. 1882 CD 2004

ORDER

AND NOW, this 25th day of February 2005, the order of the Court of Common Pleas of Allegheny County dated August 30, 2004 directing the Appellant Fund to pay benefits retroactive to June 19, 2001, plus interest, and the order of that court dated September 7, 2004, finding the amount owed to Appellee Ross as of August 30, 2004, to be $ 43,380.65, plus interest, are AFFIRMED; and Appellant Fund shall pay to Appellee Ross the sum of $ 43,380.65 FORTHWITH

AND FURTHER, this matter is remanded to the trial court for the calculation of the additional principal and the interest owed to Ross, calculated from June 19, 2001, which sum shall be paid within thirty (30) days of the date of this order.

Jurisdiction relinquished.

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

Audrey Ross,
Appellee
v.
Policemen's Relief and Pension Fund
of the City of Pittsburgh,
Appellant

No. 1882 CD 2004

ORDER

NOW, April 27, 2005, having considered appellant's application for reargument, the application is denied.

IN THE SUPREME COURT OF PENNSYLVANIA

Audrey Ross,
Respondent
v.
Policemen's Relief and Pension Fund
of the City of Pittsburgh,
Petitioner

No. 228 WAL 2005

ORDER

PER CURIAM:

AND NOW, this 8th day of March, 2006, the Petition for Allowance of Appeal is DENIED.

Madame Justice Baldwin did not participate in the consideration or decision of this matter.

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

Audrey Ross,

Plaintiff

v.

Policemen's Relief and Pension Fund
of the City of Pittsburgh,

Defendant

GD 02-21202

ORDER OF COURT

AND NOW, this 21st day of January, 2003, and after such hearing and notice, as is appropriate, it is hereby ORDERED, ADJUDGED and DECREED that Defendant's Preliminary Objections are overruled for the reasons set forth in the video record, in particular that the status of the marriage of Plaintiff and her deceased husband has been finally decided and Defendant has no standing to object nor to notice of that Orphans' Court Proceeding.

Friedman, J.

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

Audrey Ross,

Plaintiff

v.

Policemen's Relief and Pension Fund
of the City of Pittsburgh,

Defendant

GD 02-21202

OPINION

Friedman, J., March 11, 2003

Defendant has appealed from this Court's Order of January 21, 2003, in which we overruled Defendant's Preliminary Objections. The Order, however, is not a final one. Defendant's Notice of Appeal was apparently filed as a precautionary measure in the event that the appellate court concludes that our Order was indeed final based upon § 7532 of the Declaratory Judgment Act, 42 Pa.C. S.A. §

7532.[1] However, Defendant has not asked the undersigned to enter an order allowing an immediate appeal of an interlocutory order, and this may be fatal to the appeal. Following oral argument, we entered the Order appealed from, which provided as follows:

> it is hereby ORDERED, ADJUDGED and DECREED that Defendant's Preliminary Objections are overruled for the reasons set forth in the video record, in particular, that the status of the marriage of Plaintiff and her deceased husband has been finally decided and Defendant had no standing to object nor to notice of that Orphans' Court proceeding.

In the event the appeal is not quashed, the reasons for the Order complained of are set forth below.

Plaintiff filed the instant Complaint for Declaratory Judgment in which she alleged the following: She resided with Gregory William Adams, who passed away on June 19, 2001. Mr. Adams was a beneficiary of the Defendant Pension Fund. On August 23, 2002, the Honorable Walter R. Little of the Orphans' Court of the Court of Common Pleas of Allegheny County issued an Opinion and Decree ruling that Plaintiff and Mr. Adams were married. The daughters of the late Mr. Adams opposed the declaration of marriage and participated in the hearing which led to that

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[1]Section 7532 provides that

> [c]ourts of record, within their respective jurisdictions, shall have the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and *such declarations shall have the force and effect of a final judgment or decree.*

(Emphasis added.)

decree. Plaintiff subsequently applied for pension benefits from the Defendant, but Defendant has refused to provide them, refusing to honor Judge Little's ruling because they were not parties to that action.

In her Complaint for Declaratory Judgment, Plaintiff seeks a decree "requiring the Defendant to honor the marriage of the Plaintiff and to provide her widow benefits retroactive to June 19, 2001 and continuing during her lifetime, awarding her attorneys fees and costs incurred in this matter, and for such other relief as the Court deems just."

Defendant raised two preliminary objections to the Complaint: that the complaint failed to state a cause of action upon which relief could be granted, and "[s]pecifically, plaintiff asks that defendant be held to be bound by a decree entered in another proceeding. Plaintiff admits that defendant was not a party to that proceeding. The decree, accordingly, cannot bind defendant."

Defendant orally argued in support of its objections that if it had been given the opportunity to participate in the Orphans' Court proceedings, it would have objected to the Orphans' Court's jurisdiction. In its brief Defendant had two additional arguments which were not brought to the Court's attention during oral argument: that Judge Little's Opinion and Decree do not mention Defendant or order Defendant to do anything and that Judge Little's Opinion and Decree do not include a finding of when the marriage began (which would be necessary for Defendant to determine whether benefits are payable, since Plaintiff and Mr. Adams would have to have been married for two years before his death for Plaintiff to be eligible to receive benefits). These last two items are matters for an Answer, or are evidence for trial, not for Preliminary Objections. To the extent they are appropriate objections at this stage,

they were waived for failure to raise during oral argument.[2]

When asked what authority required Defendant to have notice of the Orphans' Court proceeding, Defendant cited the case Allison Park Contractors, Inc. v. Workers' Compensation Appeal Board, 731 A. 2nd 234 (Pa. Cmwlth. 1999). In that case, the putative husband died as a result of a work-related accident. After his death, the putative wife and the man's parents entered into a consent order stipulating that the parties were married. The wife then petitioned for workers' compensation benefits.

The Commonwealth Court concluded that the consent order was not binding in the workers' compensation proceedings because there was no hearing and adjudication by the lower court, and because a consent order by its nature is simply an agreement between the parties. The Allison Park case, however, is clearly distinguishable from the case at hand. Here the declaration that the parties were married was arrived at after a full adversarial hearing (albeit one in which Defendant was not a party).

Defendant also argued that it should have had notice based on general principles of due process. It took the position that Judge Little's finding that there was a valid marriage has legal effect only as to the participants in the proceeding and not as to the world. This Court had, and has, the view that just as the world need not attend a marriage for it to be valid, once a judge has finally ruled there was one, the world, including Defendant, must hold its peace.

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[2]It should be remembered that Motions Court is a very busy and fast-moving court. There is not always time to do more than skim the briefs of counsel. In the instant case, the Court recalls hearing only the first argument, not the latter two. It should also be noted that the *length* of the marriage *may* be a subject of inquiry in this case but the *fact* of the marriage is governed by the doctrine of *res judicata*.

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

Audrey Ross,

Plaintiff

v.

Policemen's Relief and Pension Fund
of the City of Pittsburgh,

Defendant

GD 02-21202

ORDER OF COURT

AND NOW, this 30th day of Aug., 2004, after consideration of the pleadings filed in this case, the Motion for the Judgment on the Pleadings filed by Plaintiff and Argument of Counsel it is hereby ORDERED that Defendant is directed to pay the Plaintiff widow benefits retroactive to June 19, 2001 plus interest and to make regular payments during her lifetime.

Lutty, J.

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

Audrey Ross,

Plaintiff

v.

Policemen's Relief and Pension Fund
of the City of Pittsburgh,

Defendant

GD 02-21202

ORDER OF COURT

AND NOW, this 9th day of Sept., 2004, upon consideration of the pleadings filed, argument of counsel and Order of Court dated August 30, 2004, it hereby ORDERED that the amount of widow benefits due as of August 30, 2004 is $43,380.65 plus interest.

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

Audrey Ross,

Plaintiff

v.

Policemen's Relief and Pension Fund
of the City of Pittsburgh,

Defendant

GD 02-21202

OPINION

Lutty, J., October 1, 2004

This is an appeal from an Order entered by this Court on August 30, 2004 wherein this Court granted Plaintiff's Motion for Judgment on the Pleadings.

The facts are summarized as follows: For approximately eleven (11) years, Plaintiff resided with Gregory William Adams ("Decedent"), who passed away on June 19, 2001. The Decedent worked as a City of Pittsburgh Police Officer, and therefore, was a beneficiary of the Defendant Pension Fund. The Decedent and Plaintiff never held a formal marriage ceremony. After the Decedent's death, Plaintiff filed for spousal pension benefits from Defendant. Defendant then informed Plaintiff that since she did not have a formal marriage license, she would have to acquire a court order declaring a common law marriage existed in order to receive the spousal benefits.

Plaintiff then brought a declaratory judgment action

seeking to have a common law marriage declared between herself and the Decedent.[1] The daughters of the Decedent, through counsel, filed an Answer and New Matter to Plaintiff's Complaint for Declaratory Judgment and also filed a Memorandum of Law in Opposition to Common Law Marriage. After a full hearing on the matter, and although the daughters of the Decedent participated in the hearing and "vigorously opposed" the declaration of marriage,[2] on August 23, 2002, the Honorable Walter R. Little of the Orphans' Court Division of the Court of Common Pleas of Allegheny County issued a well-reasoned Opinion and Decree ruling that Plaintiff and Decedent were indeed married.

Plaintiff subsequently applied for pension benefits from the Defendant; however, since Defendant was not a "party" to that prior action, Defendant still refused to provide the benefits and is refusing to honor Judge Little's ruling. Accordingly, Plaintiff filed the instant Complaint for Declaratory Judgment. In her Complaint, Plaintiff seeks a decree requiring the Defendant to honor the marriage of the Plaintiff and to provide her with widow benefits retroactive to June 19, 2001 and continuing during her lifetime, awarding her attorneys fees and costs incurred in this matter, and for such "other relief as the court deems just."[3]

This Court accepted and now hereby adopts the findings of fact and conclusions of law in Judge Little's Opinion and Decree. Based on such, this Court was simply not persuaded that a different legal conclusion would be

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[1] *Audrey Ross v. Gregory William Adams*, The Court of Common Pleas of Allegheny County, Pennsylvania, Orphans' Court Division, Case Number 1232 of 2002 (formerly GD 01-19122).

[2] See Defendant's Answer to Plaintiff's Complaint, ¶ 7.

[3] Accordingly, this Court found it just to award interest.

reached with a second hearing. Therefore, on August 30, 2004, since a declaration of marriage was arrived at after a full adversarial hearing, and based on the pleadings filed, oral arguments of both parties, and on Judge Little's well-reasoned sound Opinion, this Court granted Plaintiff's Motion for Judgment on the Pleadings and directed Defendant to pay Plaintiff widow benefits, retroactive to June 19, 2001, plus interests, and to make regular payments during Plaintiff's lifetime.

Additionally, to require Plaintiff to file a separate and distinct declaratory judgment action against each and every potential party that questions her marriage, after the issue has already been decided by a full adversarial hearing, is plainly unreasonable.

WHEREFORE, for the foregoing reasons, this Court's Order should be affirmed and the Defendant's appeal should be dismissed.

DECEDENTS, ESTATES, AND FIDUCIARIES CODE

20 Pa. C. S. § 711. Mandatory exercise of jurisdiction through orphans' court division in general

Except as provided in section 712 (relating to nonmandatory exercise of jurisdiction through the orphans' court division) and section 713 (relating to special provisions for Philadelphia County), the jurisdiction of the court of common pleas over the following shall be exercised through its orphans' court division:

(1) DECEDENTS' ESTATES[.]

(2) TESTAMENTARY TRUSTS[.].

(3) INTER VIVOS TRUSTS[.]

(4) MINORS' ESTATES[.]

(5)CUSTODIANSHIPS FOR MINORS' PROPERTY.[.]

(6) GUARDIAN OF PERSONS OF MINORS[.]

(7) ADOPTIONS[.]

(8) CUSTODY OF MINORS[.]

(9) BIRTH RECORDS[.]

(10) INCAPACITATED PERSONS' ESTATES[.]

(11) ABSENTEES' AND PRESUMED DECEDENTS' ESTATES[.]

(12) FIDUCIARIES[.]

(13) SPECIFIC PERFORMANCE OF CONTRACTS[.]

(14) LEGACIES, ANNUITIES AND CHARGES[.]

(15) CONSTRUCTION OF ADMINISTRATIVE POWER[.]

(16) DISPOSITION OF TITLE TO REAL ESTATE TO RENDER IT FREELY ALIENABLE[.]

(17) TITLE TO PERSONAL PROPERTY. The

adjudication of the title to personal property in the possession of the personal representative, or registered in the name of the decedent or his nominee, or alleged by the personal representative to have been in the possession of the decedent at the time of his death.

(18) APPEALS AND PROCEEDINGS FROM REGISTERS[.]

(19) MARRIAGE LICENSES. Marriage licenses, as provided by law.

(20) INHERITANCE AND ESTATE TAXES[.]

(21) NONPROFIT CORPORATIONS[.]

(22) AGENTS[.]

20 Pa. C. S. § 712 Nonmandatory exercise of jurisdiction through orphans' court division

The jurisdiction of the court of common pleas over the following may be exercised through either its orphans' court division or other appropriate division:

(1) TITLE TO REAL ESTATE.-- The determination of the persons to whom the title to real estate of a decedent or of the creator of an estate or trust has passed by devise or descent or by the terms of the trust instrument where jurisdiction of such estate or trust is exercised through the orphans' court division: Provided, That nothing herein shall be construed to restrict the provisions of section 711 (relating to mandatory exercise of jurisdiction through orphans' court division in general) relating to distribution of real estate in an estate or trust.

(2) GUARDIAN OF PERSON.-- The appointment, control and removal of the guardian of the person of any incapacitated person.

(3) OTHER MATTERS.-- The disposition of any case where there are substantial questions concerning matters enumerated in section 711 and also matters not enumerated in that section.

DECLARATORY JUDGMENT ACT

42 Pa. C. S. § 7531. Construction of subchapter

(a) GENERAL RULE.-- This subchapter is declared to be remedial. Its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and is to be liberally construed and administered.

. . . .

42 Pa. C. S. § 7540. Parties

(a) GENERAL RULE.-- When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party and shall be entitled to be heard.

(b) TAX MATTERS.-- In any proceeding which involves the effect of any asserted legal relation, status, right, or privilege upon the determination of any tax, the appropriate taxing authority shall be served with a copy of the proceeding, but if such taxing authority does not enter its appearance, the requirements of this section shall

nevertheless be satisfied if the court considers that the interests of the taxing authority are adequately represented.

42 Pa. C. S. § 7541.

. . . .

(c) EXCEPTIONS.-- Relief shall not be available under this subchapter with respect to any:

(1) Action wherein a divorce or annulment of marriage is sought except as provided by 23 Pa.C. S. 3306 (relating to proceedings to determine marital status).

. . . .

DIVORCE CODE

23 Pa. C. S. § 3306. Proceedings to determine marital status.

When the validity of a marriage is denied or doubted, either or both of the parties to the marriage may bring an action for a declaratory judgment seeking a declaration of the validity or invalidity of the marriage and, upon proof of the validity or invalidity of the marriage, the marriage shall be declared valid or invalid by decree of the court and, unless reversed upon appeal, the declaration shall be conclusive upon all persons concerned.

MARRIAGE LAW

23 Pa. C. S. § 1103 Common-law marriage

No common law marriage contracted after January 1, 2005, shall be valid. Nothing in this part shall be deemed or taken to render any common-law marriage otherwise lawful and contracted on or before January 1, 2005, invalid.

MUNICIPAL CODE

53 P.S. § 895.402 Revision of financing from State revenue sources; General Municipal Pension System State Aid Program

(a) ESTABLISHMENT OF PROGRAM.-- There is hereby established a General Municipal Pension System State Aid Program. Notwithstanding any applicable provision of the act of June 28, 1895 (P.L. 408, No. 289), referred to as the Foreign Fire Insurance Premium Tax Allocation Law, the act of May 12, 1943 (P.L. 259, No. 120), referred to as the Foreign Casualty Insurance Premium Tax Allocation Law, or the act of March 4, 1971 (P.L. 6, No. 2), known as the Tax Reform Code of 1971, to the contrary, the provisions of this section and sections 607 and 706 shall govern with respect to the insurance premium taxes on foreign fire insurance companies and foreign casualty insurance companies for allocation pursuant to the General Municipal Pension System State Aid Program.

. . . .

(d) ELIGIBLE RECIPIENTS OF GENERAL MUNICIPAL PENSION SYSTEM STATE AID -- Any county of the second class which, prior to the effective date of this

chapter, received allocations for its police pension fund pursuant to the act of May 12, 1943 (P.L. 259, No. 120), or any city, borough, incorporated town or township or any home rule municipality formerly classified as a city, borough, incorporated town or township which employs one or more full-time municipal employees and provides pension coverage for that employee or those employees by a pension plan which was established and maintained on the effective date of this act or which was established subsequent to the effective date of this act and has been maintained for at least three plan years, shall be entitled to receive general municipal pension system State aid.

. . . .

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53 P.S. § 23644. Establishment

There is hereby created and established, in every city of the second class in this Commonwealth, a fund for the care, maintenance, and relief of aged, retired, and disabled employes of the Bureau of Police of such city, which fund shall be known as the "Policemen's Relief and Pension Fund of the City of ....."

53 P.S. § 23645. Sources of money for fund

Such fund shall consist of and to it shall be transferred and paid--

(1) All disciplinary fines imposed upon the policemen of such city.

(2) The income from any and all trust funds which may hereafter be established by gift for the benefit of such

persons as are eligible to be beneficiaries under this fund.
(3) The dues of the members of the fund as hereinafter stipulated.

(4) All donations and appropriations of money, from whatever source, which shall be made to the fund.

(5) All monies heretofore required to be paid by cities of the second class to the organization or association, constituting and having in charge the distribution of police pension funds in such cities.

(6) Sums to be annually paid into said fund by each city of the second class, in amounts sufficient to maintain the pensions or compensations and service increments due under this act. The public authorities of every city of the second class, charged with the disbursements, expenditures, and appropriations thereof, shall annually set aside, apportion, and appropriate out of all taxes and income of the said cities unto the fund hereby created, a sum sufficient to maintain the pensions or compensations and service increments due under this act, and to carry out the provisions of this act.

(7) Contributions by members to the fund shall be applied annually to pension payments made from the fund where the total contributions by members are insufficient to meet pension payments due. The governing body of the municipality shall appropriate sufficient moneys to meet the obligations of the fund in the event that the appropriations made by the city are over and above the annual requirements of the fund. Such surpluses shall be returned by the pension fund to the general fund of the city.

53 P.S. § 23653

Each member in active service shall be required--

(1) To contribute to said fund six per centum of his rated

monthly salary or wages, which shall be deducted from his salary or wages, by the city controller from the payroll for the last half of each month, and paid into the fund.

. . . .

53 P.S. § 23654.1. Married persons; pension to surviving spouse and dependent children

(a) Any married person who elects in writing to be governed by the provisions of this amendment and who retires under the provisions of this act shall, at the time of his retirement, receive the pension provided by this act during his lifetime and a pension after his death, payable to his surviving spouse at the time of his death, equal to fifty per centum of his pension: Provided, That such person so retiring shall have been married to his spouse for not less than two years prior to the date of death and the spouse was dependent upon such deceased employee at the time of his death.

(a.1) Any retired member of the Police Pension Fund who retired prior to August 27, 1963, may, within ninety days after the effective date of this amendment, elect to be governed by the provisions of this subsection, provided such election shall be in writing and that such writing shall be filed with the secretary of the Police Pension Fund. Each retired member who elects to be governed under the provisions of this subsection shall agree to contribute one-half of one percent of his monthly pension to the Police Pension Fund. Upon the death of any retired member who elected in the manner above prescribed to be governed by this subsection, his widow and surviving children shall receive the benefits otherwise provided by this act for widows and children of deceased members who elected to be governed by the amending act of August 27, 1963 (P.L. 1297) and any further amendments thereto.

(b) Such surviving spouse shall be entitled to receive payments commencing the first day of the month in which the death of the deceased spouse occurs, and shall continue to and terminate upon the death of such surviving spouse, unless such surviving spouse shall remarry, in which event the board may allocate the pension to dependent children or parents as provided in this act: Provided, That in no case shall total payments to a member or his survivors or his estate be less than the deceased member's contribution into the fund.

(c) In the event there is no surviving spouse, or the surviving spouse dies or remarries while receiving payments under this section, and where there are dependent children of the deceased member of the fund, the board may pay to each such dependent child twenty-five per centum of the pension earned by the deceased member until the age of eighteen or marriage or death: Provided, That the board may indefinitely continue payments to a dependent incompetent child.

Where the sums payable to dependent children under this section are equal to the maximum pension to which the widow would be entitled, it shall be divided equally among the children entitled thereto.

In the event there are no surviving children or no widow entitled to receive the payments provided for in this act, any dependent parents of the deceased member shall receive the monthly payments the widow would have received had she survived and not remarried.

(d) The word "pension" as used in this section shall be construed to mean the sum of the pension provided by this act plus the amount of service increment, if any, to which the married person retiring shall be entitled.

53 P.S. § 23654.3. Election to be governed by 1963 amendment; payments

Any member of the Police Pension Fund and any person hereafter joining the Police Pension Fund may elect to be governed by the provisions of this amendment, provided such election shall be in writing and that writing shall be filed with the secretary of the Police Pension Fund and such election shall be accompanied by a payment of monies required by section 11.4 of this act, from August 27, 1963, or from the date of employment by the Bureau of Police, whichever is later.

53 P.S. § 23654.4. Contributions

Each member who elects to be governed under the provisions of this amendment shall agree to contribute one-half of one per cent of his earned compensation in addition to all other required contributions as set forth in this act.

RULES OF CIVIL PROCEDURE

Rule 1026. Time for Filing. Notice to Plead

(a) Except as provided by Rule 1042.4 or by subdivision (b) of this rule, every pleading subsequent to the complaint shall be filed within twenty days after service of the preceding pleading, but no pleading need be filed unless the preceding pleading contains a notice to defend or is endorsed with a notice to plead.

Rule 1029. Denials. Effect of Failure to Deny

(a) A responsive pleading shall admit or deny each averment of fact in the preceding pleading or any part thereof to which it is responsive. A party denying only a part of an averment shall specify so much of it as is admitted and shall deny the remainder. Admissions and denials in a responsive pleading shall refer specifically to the paragraph in which the averment admitted or denied is set forth.

(b) Averments in a pleading to which a responsive pleading is required are admitted when not denied specifically or by necessary implication. A general denial or a demand for proof, except as provided by subdivisions (c) and (e) of this rule, shall have the effect of an admission.

EXCERPTS FROM PETITIONER'S COMMONWEALTH COURT BRIEF

In *Allison Park Contractors et al. v. Workers Compensation Appeal Board*, 731 A. 2nd 234 (Pa. Cmwlth. 1999), Your Honorable Court held that a determination of marital status made in the Family Division of the Court of Common Pleas of Allegheny County was not binding on the employer. The claimant had named the decedent's parents as defendants in the Family Division proceedings; the outcome was a consent decree recognizing the marriage. The employer had not been a party to the Family Division proceedings. While the discussion emphasizes that the declaratory judgment was a consent decree, the decision also points out, in notes 2 and 3 at 236 and 237, the inapplicability of collateral estoppel to a party who was not involved in the prior action. [Brief for Appellant at 16.]

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In *Carey v. Piphus*, 435 U.S. 247, 259, 98 S. Ct. 1042, 55 L. Ed. 2nd 252 (1978), the United States Supreme Court stated:

> [T]he right to procedural due process is "absolute" in the sense that it does not depend upon the merits of a claimant's substantive assertions[.][*Id.* at 266, 98 S. Ct. at 1054, 55 L. Ed. 2nd at 266.]

Accord: *Hamdi v. Rumsfeld*, ___ U.S. ___, 124 S. Ct. 2633, 159 L. Ed. 2nd 578 (2004).

Procedural due process was explained as follows in *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2nd 556 (1972):

> For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right

> they must first be notified." [*Id.* at 80, 92 S. Ct. at 1994, 32 L. Ed. 2nd 556; citation omitted.]

In *Hansberry v. Lee*, 311 U.S. 32, 61 S. Ct. 115, 85 L. Ed. 22 (1940), the United States Supreme Court stated:

> It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. [*Id.* at 40, 61 S. Ct. at 117, 85 L. Ed. at 26.]

Pennsylvania is part of Anglo-American jurisprudence; in *Kelly v. Mueller*, [861 A. 2nd 984 (Pa. Super. 2004)], the Superior Court stated:

> "Unless the court has the parties before it, by appearance or service of process, it is obvious that it cannot bind them by its adjudications." [Citation omitted.] "Lack of notice and an opportunity to be heard constitutes a violation of due process of law and results in an invalid judgment." [Citation omitted.] [*Id.* at P12.]

Martin v. Wilks, 490 U.S. 755, 109 S. Ct. 2180, 104 L. Ed. 2nd 835 (1989) involved plaintiffs who were challenging the conclusiveness of the decree entered in a prior action about which they had known and in which they had not chosen to intervene. [Footnote omitted.] The Court quoted the above language from *Hansberry* and the following language from *Chase National Bank v. Norwalk*, 291 U.S. 431, 54 S. Ct. 475, 78 L. Ed. 894 (1934):

> The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger. . . . Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights. [*Id.* at 441, 54 S. Ct. at 479, 78 L. Ed.

2nd at 901.]

The Court reconfirmed this principle, stating:

> A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.[2]
>
> [2][W]here a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate, legal proceedings may terminate preexisting rights if the scheme is otherwise consistent with due process. *See National Labor Relations Board v. Bildisco and Bildisco*, 465 U.S. 513, 529-30, n.10, 104 S. Ct. 1188, 1198, n. 10, 79 L. Ed. 2nd 482, 498, n. 10 (1984) ("[P]roof of claim must be presented to the Bankruptcy Court . . . or be lost"); *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S. Ct. 1340, 99 L. Ed. 2nd 565 (1988) (nonclaim statute terminating unsubmitted claims against the estate). . . . [*Id.* at 762, 109 S. Ct. at 2185, 104 L. Ed. 2nd at 844-45.]

The Court also stated:

> Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree. The parties to a lawsuit presumably know better than anyone else the nature and scope of relief sought in the action, and at whose expense such relief might be granted. It makes sense, therefore, to place on them a burden of bringing in additional parties where such a step is indicated, rather than placing on potential additional parties a duty to intervene when they

> acquire knowledge of the lawsuit. [*Id.* at 765, 109 S. Ct. at 2186, 104 L. Ed. 2nd at 846; footnote omitted.]

[Brief for Appellant at 20-22.]

EXCERPT FROM PETITION FOR ALLOWANCE OF APPEAL

A pension fund is not bound by a declaratory judgment of surviving spouse status rendered in proceedings to which it was not a party and of which it had no notice.

To the extent that § 3306 of the Divorce Code, relating to declaration of marital status, permits the Fund to be bound, it is unconstitutional. [Table of Contents of Petition for Allowance of Appeal.]

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

Audrey Ross,

Plaintiff

v.

Policeman's Relief and Pension Fund
of the City of Pittsburgh,

Defendant

GD 02-21202

COMPLAINT FOR DECLARATORY JUDGMENT

TO THE HONORABLE JUDGES OF SAID COURT:

AND NOW comes the Plaintiff by and through her undersigned counsel and states the following:

1. The Plaintiff is Audrey Ross, an adult individual residing at 1609 Morningside Avenue, Pittsburgh, Pennsylvania 15206.

2. The Defendant is the Policemans Relief and Pension Fund of the City of Pittsburgh a non-profit organization whose place of business is at 414 Grant Street, Room 922, Pittsburgh, Pennsylvania 15219.

3. Gregory William Adams was a beneficiary of the Pension Fund, who died on June 19, 2001 domiciled at 1609 Morningside Avenue, Pittsburgh, Pennsylvania 15206.

4. By Order of Court in the Court of Common Pleas Orphans Court Division No. 1232 of 2002, the Honorable Walter R. Little decreed that Audrey Ross and Gregory William Adams were married. A copy of the opinion and

order of court is attached hereto as Exhibit "A".

5. The Orphans Court had jurisdiction over the marriage of Audrey Ross and Gregory William Adams pursuant 20 Pa. C. S. A. § 711(19); 20 Pa. C. S. A. § 712(3); 42 Pa. C. S. A. § 952; and 42 Pa. C. S. A. § 732.

6. All necessary parties, i.e. the heirs of the estate of Gregory William Adams were served and appeared in the action at 1232 of 2002 Orphans Court Division.

7. The heirs of Gregory William Adams, i.e. his daughters Mary Morrow and Cheryl Adams, vigorously opposed the declaration of marriage and fully participated in the hearing and briefing of the issues.

8. As the widow of Gregory William Adams, Audrey Ross applied for pension benefits from the Policemans Relief and Pension Fund of the City of Pittsburgh.

9. Without justification and in total disregard of a court order, the Defendant refused to provide Audrey Ross the widow benefits to which she is entitled. A copy of the refusal is attached hereto as Exhibit "B".

10. Nowhere in the code of Pennsylvania is it required that a pension fund be a necessary party to a declaration of marriage.

11. As a result to Defendant's refusal to provide benefits to the Plaintiff, Plaintiff has been substantially damaged and has incurred considerable costs and attorneys fees.

WHEREFORE, Plaintiff prays that this Honorable Court enter a decree requiring the Defendant to honor the marriage of the Plaintiff and to provide her widow benefits retroactive to June 19, 2001 and continuing during her lifetime, awarding her attorneys fees and costs incurred in this matter, and for such other relief as the Court deems just.

s / Jonathan G. Babyak

EXHIBIT A

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

ORPHANS' COURT DIVISION

Audrey Ross,
Plaintiff

v.

Gregory Williams Adams,
Defendant

No. 1232 of 2002

OPINION

Little, J., August 23, 2002

BACKGROUND:

Audrey Ross (Plaintiff) lived with Gregory Adams (Decedent) for approximately eleven (11) years before his death on June 19, 2001. The Decedent worked as a City of Pittsburgh Police Officer. The Decedent and the Plaintiff never held a formal marriage ceremony. After the Decedent's death, the Plaintiff filed for spousal pension benefits from the Fraternal Order of Police (FOP). The FOP informed the Petitioner that since she did not have a formal marriage license, she would have to acquire a court order declaring a common law marriage in order to receive the spousal benefits.

The Plaintiff brought this action in the nature of a complaint for declaratory judgment to have a common law

marriage declared between herself and the Decedent (Gregory Williams Adams). The Decedent's daughters, Cheryl Adams and Mary Morrow (Respondents) oppose the declaration of a common law marriage. The Respondents base their argument on certain inactions by the Decedent and Plaintiff in that the Plaintiff and Decedent never held a formal marriage ceremony, never opened a joint checking account, never exchanged greeting cards with a husband or wife indication, and always filed their IRS tax returns as single.

ISSUE:

The issue presented for consideration before this Court is whether or not the Plaintiff and the Decedent had a common law marriage.

ANALYSIS:

Continual cohabitation and reputation of marriage create a rebuttable presumption of marriage. *Staudenmayer v. Staudenmayer*, 552 Pa. 253, 714 A. 2nd 1016 (1998). The Dead Man's Act prohibition of testimony does not prevent the proving of marriage by cohabitation and reputation. *Id.* The Plaintiff has established that she and the Decedent cohabitated for over eleven (11) years. This fact was even conceded by the Respondents. The Plaintiff also established that she and the Decedent had a general reputation of marriage among family, friends, coworkers, and the community at large.

The Plaintiff presented testimony from the Decedent's nephew, Thomas Adams. Thomas Adams testified that his children referred to the Plaintiff as Aunt Audrey both orally and in writing. William Polinsky was friends with the Decedent before he (Decedent) moved in with the Plaintiff and also lived across the street from their home. William Polinsky testified that he believed the Plaintiff and the Decedent were married. The Plaintiff's employer, Frank Fusca, testified that he believed the Plaintiff and the

Decedent were married. Mr. Fusca also testified that the Decedent would call and ask to speak to his wife. James Kirby, a neighbor of the Petitioner and the Decedent, also testified that he believed the Plaintiff and the Decedent were married. The Plaintiff has clearly established that she and the Decedent had a reputation of being husband and wife.

The Decedent purchased an engagement ring and a wedding band for the Plaintiff in December of 1994. The testimony presented before this Court established that roughly two years later the Plaintiff purchased a wedding band for the Decedent. Both the Plaintiff and the Decedent always wore their rings. The Respondents contend that there is no testimony by the Decedent regarding the declaration of marriage. This testimony would be prohibited by the Dead Man's Act. The Plaintiff has established that she and the Decedent continually cohabitated, had a reputation of marriage, constantly wore wedding rings they had given one another, and the Decedent specifically referred to the Plaintiff as his Wife. No evidence was introduced that the Decedent or Plaintiff ever opposed the Plaintiff being referred to as his wife. The testimony and evidence clearly establish that the Plaintiff and the Decedent continually cohabitated and had a reputation of marriage as required by the case of *Staudenmayer, supra.*

The Respondents argue that no marriage existed based in part on the fact that the Plaintiff and the Respondent did not have a joint checking account nor did they give greeting cards to one another that denoted to "Husband" or "Wife". The Respondents believe this should be enough to overcome the presumption of marriage. The Respondents are mistaken. The Plaintiff and the Decedent cohabitated for eleven (11) years and had a reputation of marriage.

The Respondents have additionally alleged that there was no marriage between the Plaintiff and the Decedent

because the Plaintiff always filed her income tax returns as single. Evidence was presented before this Court that the Decedent had had problems with the IRS in the past for failing to file income tax returns, and also that the Decedent had a gambling problem. These problems were the reason why the Plaintiff did not file a joint tax return and did not commingle funds with the Decedent in a joint checking account. The Court is of the opinion that how individuals file their income tax returns is not solely [determinative] as to their marital status.

The Respondents have cited case law to support their position, all of which is factually different from the matter before this Court. In *Estate of Rees*, 331 Pa. Super. 231, 480 A. 2nd 327 (1984), the parties claiming marriage lived in separate states for twenty-four (24) consecutive years. In *Rees*, there was no evidence presented that the Decedent had a reputation for being married in his community. In the *Estate of Gavula*, 490 Pa. 535, 417 A. 2nd 168 (1980), the testimony established that the Decedent said he was not married and the alleged wife said that she would be married in the future. In the case of *In re Cummings Estate*, 330 Pa. Super. 255, 479 A. 2nd 537 (1984), testimony showed that the Decedent told his father on several occasions that he was indeed not married. The facts of the cases cited by the Respondents are wholly inapplicable to the present matter before this Court.

The Plaintiff lived with the Decedent for eleven (11) years and had a reputation in the community for being married to him. The Respondents have failed to produce evidence that would establish that the parties intended their relationship to be anything but marriage.

CONCLUSION:

WHEREFORE, based on the [foregoing] analysis, this Court is of the Opinion that Audrey Ross and Gregory Williams Adams were indeed married. Therefore an Order

granting the complaint for declaratory judgment filed by the Plaintiff to establish Audrey Ross's marriage to the Decedent (Gregory William Adams) shall be entered.

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

ORPHAN'S COURT DIVISION

Audrey Ross,
Plaintiff

v.

Gregory Williams Adams,
Defendant

No. 1232 of 2002

ORDER OF COURT

AND NOW, to-wit, this 23rd day of August, 2002, an Opinion having been entered in the above-captioned case, it is hereby ORDERED, ADJUDGED and DECREED that the complaint filed by the Plaintiff, Audrey Ross, to have a common law marriage declared between herself and the Decedent, Gregory Williams Adams, is granted.

Little, J.

EXHIBIT B

JAMES A. WYMARD, ESQUIRE
ATTORNEY AT LAW
220 Grant Street
Pittsburgh, Pennsylvania 15219-2123

VOICE (412) 281-6225
FAX (412) 471-8794

Jonathan G. Babyak, Esquire
Campbell and Levine, LLC
1700 Grant Building
Pittsburgh, PA 15219

Re: Audrey Ross v. Gregory W. Adams
No. 1232 of 2002 (Orphans' Court)

Dear Mr. Babyak:

I am the solicitor for the Policemen's Relief and Pension Fund of the City of Pittsburgh. You have already been informally advised that the Fund does not consider itself bound by the order entered by the Orphans' Court finding Audrey Ross to be the common law widow of Gregory W. Adams, and I am writing to confirm that advice. The Fund was not made a party to the action, received no notice of it, and had no opportunity to litigate the issue of whether a common law marriage took place between Ms. Ross and Mr. Adams.

Past practice has been for such matters to be filed in the Family Division and for the Fund to be named as a defendant. For a claimant to be entitled to surviving spouse benefits, he or she must not only prove a marriage but must

show that the marriage took place at least two years prior to the death of the officer.

The matter does not involve the issuance of a marriage license, nor does it involve the estate of a decedent. There would be no benefit payable to Mr. Adams' estate from the Fund regardless of his marital status.

Moreover, it is not clear to us that there is any estate in this case. If there is not, the question of whether there was a marriage is not ancillary to any larger matter before the Orphans' Court.

I would direct your attention to the decision of the Commonwealth Court in *Allison Park Contractors et al. v. Workers Compensation Appeal Board*, 731 A. 2nd 234 (Pa. Commw. 1999). In that case, the court held that a determination of marital status made in the Family Division was not binding upon the employer. The employer had not been a party to the Family Division proceedings. While the discussion emphasizes that the declaratory judgment was a consent decree, it also discusses, in Notes 2 and 3, the inapplicability of collateral estoppel to a party who was not involved in the prior action.

This office will accept service of whatever you choose to file in the future in this matter.

Very truly yours,

James A. Wymard

cc: Peter J. Walsh, Secretary-Treasurer
Policemen's Relief and Pension Fund
of the City of Pittsburgh

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

Audrey Ross,

Plaintiff

v.

Policeman's Relief and Pension Fund
of the City of Pittsburgh,

Defendant

GD 02-21202

ANSWER TO COMPLAINT FOR
DECLARATORY JUDGMENT
WITH NEW MATTER

Now comes the defendant, Policemen's Relief and Pension Fund of the City of Pittsburgh, by its attorneys, James A. Wymard and Norma Chase, and for its answer states as follows:

1. The allegations in Paragraph 1 are admitted.

2. The correct name of the defendant is set forth above. Defendant is a municipal pension fund. In all other respects, the allegations in Paragraph 2 are admitted.

3. The allegations in Paragraph 3 are admitted.

4. The allegations in Paragraph 4 are admitted.

5. Paragraph 5 states a conclusion of law to which no response is required.

6. Paragraph 6 states a conclusion of law to which no response is required. To the extent that Paragraph 6 contains factual allegations, those allegations are addressed in Paragraph 7 *infra*.

7. It is admitted that Mary Morrow and Cheryl Adams were the heirs of Gregory William Adams in the sense that they were the persons who would, absent a will providing otherwise, inherit estate he had if he left no surviving spouse. It is admitted that they appeared and participated in the Orphans' Court proceedings and that they vigorously opposed the declaration of marriage during the pendency of those proceedings.

8. After diligent investigation, defendant does not believe that plaintiff entered into a common law marriage with Mr. Adams, and defendant accordingly denies that Audrey Ross is the widow of Gregory Adams. It is admitted that she applied for pension benefits.

9. It is admitted that defendant refused to pay a surviving spouse benefit to Audrey Ross for the reasons set forth in its counsel's letter dated September 23, 2002 and appended to plaintiff's complaint as Exhibit B. It is denied that said refusal was unjustified or was in disregard of a court order.

10. Paragraph 10 states a conclusion of law to which no response is required.

11. It is denied that plaintiff has been damaged by defendant. It is admitted that plaintiff has incurred counsel fees and costs in pursuing the instant action, but it is denied that defendant has engaged in any conduct justifying the imposition of those costs on defendant even if plaintiff were to prevail on the question of marriage.

NEW MATTER

1. The decedent left no estate either for probate or inheritance tax purposes, and the question of his marital status was not ancillary to any larger matter before Orphans' Court.

2. Under the circumstances, the proper forum was either the Family Division or the Civil Division. In the past, such matters have been heard in the Family Division.

3. Plaintiff initially attempted to file her original declaratory judgment action in the Orphans' Court, but the Orphans' Court clerk refused to accept it for filing. She filed it in the Civil Division on September 25, 2001 at G.D. 01-19122. She named only the decedent as a defendant. She did not state the purpose for which declaratory judgment was sought. She gave notice of the proceedings to Mr. Adams' adult daughters from a terminated marriage. While they did not formally intervene, they filed an answer contesting the declaration, and were thereafter treated as parties. A true and correct copy of the docket entries at G.D. 01-19122 is appended hereto as Exhibit A and incorporated by reference.

4. On February 15, 2002, plaintiff's counsel, after notice to the daughters' counsel, presented the Honorable Walter R. Little with a motion asking that Orphans' Court schedule a hearing on plaintiff's request for declaratory judgment. A true and correct copy of said motion is appended hereto as Exhibit B and incorporated by reference. The motion did not advise the court that the declaration of marital status was being sought solely for pension purposes, and stated "There are substantial questions concerning the marriage and the decedent's estate[.]" Judge Little granted the motion, whereupon it was assigned an Orphans' Court docket number. All further proceedings took place in Orphans' Court.

5. Neither the Administrative Judge of the Civil Division nor the Administrative Judge of the Orphans' Court Division approved the transfer of the case to Orphans' Court.

6. At the commencement of the hearing, plaintiff's counsel advised Judge Little that a pension entitlement

claim was the major reason that the action was brought. He mistakenly identified the source of the pension as the "FOP".

7. The Fraternal Order of Police, commonly referred to as the FOP, is the collective bargaining agent for City of Pittsburgh police officers; it does not pay them retirement benefits.

8. Plaintiff's counsel went on to tell the court:

> Ms. Ross is not making any claims against the estate, etc. There was virtually no estate. So, it's not a claim contrary to any heirs claims to the estate, etc. It's strictly an action to establish the marriage to qualify for pension benefits as a widow.

9. The pension is either payable to plaintiff or to no one. The daughters of the decedent had no financial stake whatsoever in the question of whether there was a marriage between plaintiff and the decedent.

10. The daughters of the decedent filed no exceptions to the Orphans' Court decree and took no appeal therefrom. The entry of the decree was the last action in Orphans' Court.

11. At no time prior to the entry of the decree was defendant (or the Fraternal Order of Police) given any notice of either the Civil Division or Orphans' Court proceedings, nor was any notice published. Defendant was first advised of the decree on or about September 10, 2002; this was defendant's first knowledge of the proceedings.

12. No process of Orphans' Court has ever issued against defendant, and the instant action is plaintiff's first attempt to enforce the Orphans' Court decree against defendant.

13. The Orphans' Court decree did not direct defendant or anyone else to do anything and made no determination as to whether the marriage had occurred more than two

years before the death of the participant, a prerequisite for surviving spouse benefits.

WHEREFORE, defendant requests that plaintiff's stated request for declaratory and monetary relief and her claim for counsel fees and costs be denied.

Subject to the penalties of 18 Pa. C. S. § 4904 (unsworn falsification to authorities), I verify that the foregoing statements are true and correct to the best of my knowledge, information, and belief.

s / Peter J. Walsh
Secretary-Treasurer
s / Norma Chase
s / James A. Wymard

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

Audrey Ross,

Plaintiff

v.

Policeman's Relief and Pension Fund
of the City of Pittsburgh,

Defendant

GD 02-21202

MOTION FOR JUDGMENT ON THE PLEADINGS

AND NOW comes Plaintiff by and through her undersigned counsel and files this Motion for Judgment on the Pleadings and states as follows:

1. The Order of the Honorable Judith A. Friedman overruling Preliminary Objections of the Defendant, clearly stated that the Defendant had no standing to object to the Declaration of Marriage entered by the Honorable Walter Little.

2. Judge Friedman entered an Opinion on the reasoning behind the Order, as a result of the Appeal filed by Defendants. A copy of the Opinion is attached hereto as Exhibit "A".

3. At Argument of the Preliminary Objections filed by Defendant, the Court warned counsel not to raise issues involving the validity of the Order.

4. Despite the ruling of Judge Friedman, Defendant's Answer and New Matter solely attack the Decree of

Marriage entered by Judge Little.

5. Defendant's Answer and New Matter raises no defense to the Declaratory action filed by the Plaintiff.

WHEREFORE, as there exists no issue of fact to support a defense by the Defendant, Plaintiff moves this Court to enter judgment on the pleadings in its favor.

s / Jonathan G. Babyak

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

Audrey Ross,

Plaintiff

v.

Policeman's Relief and Pension Fund
of the City of Pittsburgh,

Defendant

GD 02-21202

MOTION FOR JUDGMENT ON THE PLEADINGS

Now comes the defendant, Policemen's Relief and Pension Fund of the City of Pittsburgh, by its attorneys, James A. Wymard and Norma Chase, and in support of its motion states as follows:

1. Plaintiff's Complaint for Declaratory Judgment, filed on November 6, 2002, asked the court to hold that defendant Fund was bound by an Orphans' Court decree, entered August 23, 2002, finding plaintiff to be the common law widow of the late Gregory William Adams, a retired City of Pittsburgh police officer who died on June 19, 2001.

2. Defendant's preliminary objections were denied on January 21, 2003. Because the order denying them contained declaratory language, defendant took an immediate appeal to the Commonwealth Court of Pennsylvania. The appeal was quashed and a Petition for Allowance of Appeal was denied by the Supreme Court of Pennsylvania on May 13, 2004.

3. Defendant filed an Answer to Complaint for Declaratory Judgment with New Matter on May 19, 2004. The time for plaintiff to reply to the New Matter has expired and the pleadings are accordingly closed, with the New Matter being deemed to be admitted.

4. It is undisputed that defendant was not a party to the Orphans' Court proceeding, had no knowledge of it until advised of it by plaintiff's counsel on September 10, 2002, and had no opportunity to litigate the issue of whether plaintiff entered into a common law marriage with Mr. Adams.

5. It is also undisputed that Mr. Adams left no estate, that no person with a financial interest adverse to plaintiff participated in the Orphans' Court proceedings, and that the action was brought solely in order to enable plaintiff to collect a pension based on Mr. Adams' service as a police officer.

6. The Declaratory Judgment Act, 42 Pa. C. S. § 7531 et seq., states at § 7540(a):

> When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding[.]

7. Plaintiff has asserted that 23 Pa. C. S. § 3306, relating to declaratory judgment of marital status, makes such judgments binding on the world without regard to joinder; if, in fact, § 3306 does this, it violates the Due Process Clause of the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution.

8. Accordingly, defendant is entitled to judgment as a matter of law with respect to plaintiff's claim for declaratory judgment.

9. Defendant respectfully requests that judgment be

entered in its favor with respect to that claim, with plaintiff being granted leave to amend her complaint to seek a declaration of marriage and of the date of any such marriage.

s / Norma Chase

EXCERPT FROM RESPONDENT'S COMMONWEALTH COURT BRIEF

In order to have a claim of violation of due process, the Fund must establish that it has a right to notice in a marriage action and to participate in such action if it involves a beneficiary of the Fund. The Fund is incapable of pointing to any such right and therefore cannot be denied due process. The purpose of due process is to protect against a mistaken [deprivation] of property. [Citation omitted.] The Fund has established no property rights to the assets of the Fund. The Fund is simply an administrator and the beneficiary is the one with a property right in the fund. Audrey Ross, as the widow of Gregory Adams is such a beneficiary. [Brief for Appellee at 4.]